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Miscellaneous, Etc.

Report Trust and Trustees, Vol. 3, Part 1, Sec. 222 (1940 ed.) ..... [illegible]

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In the

Supreme Court of the United States

October Term, 1940

No. _____

[redacted]

Petitioners,

vs.

[redacted]

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of [redacted] respectfully shows:

OPINIONS BELOW

The opinion of the District Court (R. 396) is reported at 67 Supp. 911.

The opinion of the Court of Appeals (R. 484) is reported at 170 F. 2d 247.

JURISDICTION

The jurisdiction of this Court is invoked under section 1254 (1) of the Judicial Code, as amended June 25, 1948 (effective Sept. 1, 1948, 62 Stat. 928; 28 U. S. C. Section 1254(1)).

The decision of the Court of Appeals was rendered December 20, 1948 (R. 484).

Petition for rehearing was denied January 17, 1949 (R. 545).

[redacted]

In Decision of the District Court and the Distinction Between the Appeal to the Court of Appeal

The Court of Appeal did not mention the matter of indispensable parties in its opinion since they had already been an appeal on the subject (116 F. 2d 85). Petitioner and the other defendants preserved the point fully in their statement of points (R. 46, 46, 45) and in their brief.

In the Court the question was moved by the previous issue of certiorari. *Universal Co. v. Board of Trade*, 314 U. S. 5. See also *Hall v. Harrison*, *Baltimore Basic Steel*, ___ U. S. ___, 70 S. Ct. 252, 9 L. Ed. 24 (January 9, 1950).

Certain important distinctions are to be noted between the case as presented originally by respondent and as finally alleged in the second amended complaint and as finally decided by the District Court.

In the first appeal the Court of Appeal treated the case as fundamentally one in which plaintiff was seeking to set aside the will and establish its sworn interest in the estate property. The Court distinguished the case at bar where the plaintiff sought construction of the will which would give him an interest in the case of his sworn trustee's acquiring the property. (116 F. 2d 85, at 88.)

The Court of Appeal reversed on the first appeal on the supposition that a decree could be entered which would not affect the interest of absent parties. In the second appeal the Court affirmed without mentioning petitioners' point that indispensable parties were absent apparently on the theory that in the first appeal had settled the matter as to law of the case. But in affirming was not apprised that there was an error of any kind under the issues presented since the decree actually entered did not affect directly the interest of absent parties.

In Decree of U. S. Court of Appeals Is Decree With Decision of This Court and Other Court of Appeals Is Not Final Decree in Absence of Indispensable Parties.

Indispensable parties were named in this case by the Court in the leading case of *Shields v. Barrow*, 17 How. 130, at page 139, to be—

> "Persons who not only have an interest in the controversy, but an interest of such nature that final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."

This definition has been repeated in substantially the same language in numerous later decisions of this Court:

Barney v. Baltimore City, 6 Wall. (73 U. S.) 280;

Elliott v. Peirsol, 1 Pet. (26 U. S.) 328;

Minnesota Co. v. St. Paul Co., 2 Wall. (69 U. S.) 609;

Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U. S. 238, 244.

Under the above general definition it is well settled that suits will lie to rescind a contract or to determine rights under it if all parties to the contract are indispensable. *Shields v. Barrow*, 17 How. 130, 141; *Gregory v. Stetson*, 133 U. S. 579; *Commonwealth Trust Co. v. Smith*, 326 U. S. 291, 295; *Williams Natural Gas Co. v. Oneok, Inc.*, 96 F. 2d 111 (C. C. A. 8, 1938); *Brown v. Powell*, 77 F. 2d 64 (C. C. A. 5, Jan. 11, 1935, petition for certiorari filed in this Court March 7, 1935, No. 693).

Further, an assignee of an overriding interest entitled under such contract to assign or the owner of such interest is indispensable. *Roper Commerce Min. Co. v.*

The Right of Absent Parties as to Necessity of Error in Decree Reserving Jurisdiction to Fix the Amount of Their Proportional Contribution to Plaintiff's Counsel Fee.

We have referred above to the prayer of the second amended complaint and to provision of the decree retaining jurisdiction "to fix the amount of proportional contribution to plaintiff's counsel fee and that remainder from said heirs, legatees and devisees of the said [illegible] children lying within said letter termination of the trust as may accept the benefit of service rendered by plaintiff's counsel in creating and preserving said interests, either by uniting to or by receiving that share in the estate hereby established." (R. 42.)

It would seem obvious that said provision of the decree could in effect impose contingent contribution upon the share of those remainder-men who are not "cut in" to share with the vested remainder construction cannot properly be imposed upon persons who are not before the court. *Hone v. Trans* (D. C. 2 F. 2d 17 (C. C. A. 2, 1927), cert. den. 277 U. S. 587.

The Decision of the Court of Appeal Is in Conflict With Decisions of This Court and Other Courts of Appeal by Affirming, in Effect, Its Decision on the First Appeal That Indispensability of Absent Parties Is Determined by Federal Rather Than State Law, With Corresponding Disregard of Illinois Decisions Regarding Indispensability.

It is first quite the Court of Appeals to the Seventh Circuit said that the rule as to indispensability of parties must be determined by federal rather than local rule, 15 F. 2d at page 860, and this was, in effect, reaffirmed by its present decision on the merits.

[redacted]

We suppose the point [illegible] to be considered by this Court only if it is not persuaded that an outright dismissal of the case is more appropriate [illegible] because it highlights the difficulties that federal courts encounter in determining important questions of State law within the sometimes narrowing limitation of the federal diversity jurisdiction.

This is a case which is in the construction of its will could best be decided by the courts of Illinois. In fact if it were not for the view of this Court recently expressed against [illegible] concerning diversity jurisdiction (*Propper v. Clark*, 337 U. S. 472, 488; and *Meredith v. Winter Haven*, 320 U. S. 228, 237) by postponing until after all State decisions had finally settled State law, a federal action in order to avoid a decision of a federal constitutional issue (*Spector Motor Co. v. McLaughlin*, 323 U. S. 101; *Alabama Public Service Commission v. Southern Railway Co.*, 341 U. S. 341; *Railroad Commission v. Pullman Co.*, 312 U. S. 496) or where the only issue is a federal question (*Thompson v. Magnolia Petroleum Co.*, 309 U. S. 478), we should reject the dissenting view of Mr. Justice Frankfurter in *Government Employees v. Windsor*, 353 U. S. 364, 366, in favor of prior State Court adjudication at the expense of federal postponement, and urge in addition to those cases that applicability vel non to cases under the diversity jurisdiction.

But though the Federal courts may not postpone decision in diversity cases pending further State Court adjudication, if the applicable law [illegible] is unclear and upon substantially similar facts, two

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[illegible]

[illegible]

> "[illegible]

[illegible]

[illegible]

[illegible]
Provision in Will

[illegible]

[illegible]
Provision in Will

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

Young (a Barrin)

[illegible]

Quarto

"Upon the marriage of my wife or upon the death [illegible] I give devise and bequeath to my said wife [illegible] to her and her assigns forever [illegible] to be equally divided among them my said children the issue of any child who may have then deceased taking by stirpes the share which such deceased child would be entitled to if living."

In the Quarto will the word "any child who may have then deceased" is obviously not tied down to any particular point of time. It is the equivalent of "who may have previously deceased" or "is deceased" or "deceased child." But in the phrase "if living" which does not contain the important phrase "at the death" *Byrn* will) or the adverb "then" (*Otto Young* will) does not tie the matter down as in the *Byrn* case and in *Le Barron* case to the termination of the trust.

The language in the other cases referred to by the court [illegible] does not seem to possess resemblance to the language in *Brown v. Byrn* or in the *Young* will. In those cases the gift to issue contain no words of survivorship as to the parent but instead in each instance described the share given to the issue simply as a "per stirpes share."

There is no recognition in any Illinois decision since

including the state of the law at that time, may be considered. "The state of the law at the time of the execution of a will often affords material assistance in arriving at the intention of the testator when that would otherwise be doubtful."

Ireland v. Meador, 269 Ill. 525, 529

"The law in this State is that a testator is presumed to have known the law and to have made his will in conformity therewith. (*Hinde v. Brownell*, 265 Ill. 465; *Walker v. Walker*, 262 Ill. 11; *Rankin v. Rankin*, 257 Ill. 286.) The state of the law at the time he will was made, therefore, affords considerable assistance in ascertaining the intention of the testator when such intention is otherwise not clear."

Petitioner earnestly believes that on the merits of the case the Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decision. They respectfully urge that this Court should grant certiorari to review a case in which the Court of Appeals has inverted the doctrine of *New Hall-road v. Thompson* by completely disregarding, instead of applying, its proper rule of law.

WHEREFORE, your petitioner respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Appeals for the Seventh Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case therein and entitled on its docket Nos. 9988, 9989 and 9990, Margaret H. Horwin, individually, and as Executrix of the Will of Joseph Aaron H. Horwin, Deceased, Plaintiff-Appellee, vs. respectively, The First National Bank of Chicago, etc., Executors, Young Hogsworth Horwin and Aaron Julius Young Kaufman Pratt, et al., Defendants-

appellant, and that the judgment of the Court of Appeals may be reversed by this Honorable Court; and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

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